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In the Supreme Court of the United States

OCTOBER TERM, 1974

CASPAR W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

WILLIAM G. WEBER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes, rules, and order involved	2
Statement	2
Summary of Argument	7
Argument	10
The Federal Magistrates Act does not authorize the automatic reference to United States Magistrates of all social security cases to prepare a recommended decision	10
A. The functions that the district courts may authorize magistrates to perform under the Magistrates Act are narrowly limited to matters ancillary to litigation not themselves involving the adjudication of cases	15
B. The challenged district court order requires magistrates to serve as special masters, in violation of the Federal Rules of Civil Procedure (which the Magistrates Act makes applicable to such service) because Rule 53 permits such reference only in exceptional cases and not routinely	23
C. The effects upon judicial administration of reference to all social security cases to magistrates do not justify General Order No. 104–D, but are matters for Congress to consider	29
Conclusion	34

CITATIONS

Cases:

	Page
Camp v. *Pitts*, 411 U.S. 138	13
Chevron Oil Co. v. *Huson*, 404 U.S. 97	33
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402	13
Ingram v. *Richardson*, 471 F. 2d 1268	27
La Buy v. *Howe Leather Co.*, 352 U.S. 249	9, 13, 26, 27
Los Angeles Brush Mfg. Corp. v. *James*, 272 U.S. 701	26, 27
McCullough v. *Cosgrave*, 309 U.S. 634	27
National Labor Relations Board v. *Hearst Publications, Inc.*, 322 U.S. 111	21
Palmore v. *United States*, 411 U.S. 389	22
Rainha v. *Cassidy*, 454 F. 2d 207	29
Schlesinger v. *United States District Court*, No. 74–1142, certiorari denied, April 28, 1975	12
TPO, Inc. v. *McMillen*, 460 F. 2d 348	16, 17, 29
United States v. *Eastmount Shipping Corp.*, 62 F.R.D. 437	24
United States v. *Wrightwood Dairy Co.*, 315 U.S. 110	22
Wingo v. *Wedding*, 418 U.S. 461	12, 20
Constitution, statutes and rules:	
United States Constitution, Article III	21, 22
80 Stat. 75–76	27
Federal Magistrates Act of 1968, 82 Stat. 1107	2
18 U.S.C. 3401	10, 21
28 U.S.C. 631(a)	22
28 U.S.C. 631(e)	21
28 U.S.C. 631(h)	21
28 U.S.C. 636	2, 16
28 U.S.C. 636(a)	10
28 U.S.C. 636(a)(3)	21
28 U.S.C. 636(b)	*passim*

Constitution, statutes and rules—Continued

	Page
28 U.S.C. 636(b)(1)	9, 18, 23, 25, 27
28 U.S.C. 636(b)(2)	17, 18, 19, 20
28 U.S.C. 636(b)(3)	18, 19, 20
Social Security Act, 49 Stat. 620, as amended, 42 U.S.C. 301, *et seq.*:	
42 U.S.C. 405(g)	2, 7
42 U.S.C. (Supp. III) 1381, *et seq.*	30
42 U.S.C. 1395, *et seq.*	2
42 U.S.C. (Supp. III) 1395ff(b)	2
5 U.S.C. 553(b)(3)	12
5 U.S.C. 703	13
12 U.S.C. (Supp. III) 1904 note	12
15 U.S.C. (Supp. III) 754(a)(1)	12
18 U.S.C. 3146	10
28 U.S.C. (1940 ed.) 1 note	27
28 U.S.C. 84(c)	27
28 U.S.C. 84(d)	27
28 U.S.C. 133	21, 27
28 U.S.C. 752	22
28 U.S.C. 1292(b)	6
28 U.S.C. 1336(a)	12
28 U.S.C. 2347(b)(3)	12
30 U.S.C. (Supp. III) 901, *et seq.*	30
33 U.S.C. 921(b)	12
42 U.S.C. 1857h-2(a)(2)	12
Federal Rules of Civil Procedure:	
Rule 34	19
Rule 35	19
Rule 53	2, 15, 23, 24, 27
Rule 53(b)	6, 24
Rule 53(c)	24
Rule 53(e)(1)	24
Rule 53(e)(2)	24
Rule 53(e)(5)	24
General Order No. 104–D (C.D. Cal.)	*passim*

Constitution, statutes and rules—Continued Page
Local Civil Rules of the U.S. District Court for the District of Columbia (as amended December 3, 1965):
Rule 9(a)(4) ---- 19
Rule 9(i) ---- 19
Rule 10 ---- 19
Miscellaneous:
Annual Report of the Director, Administrative Office of the United States Courts (1974) ---- 30
Doyle, *Implementing the Federal Magistrates Act*, 39 J. B. A. Kan. 25 (1970) ---- 20
Hearings on United States Magistrates before Subcommittee No. 4 of the House Committee on the Judiciary, 92d Cong., 1st Sess. (1971) ---- 32
Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess. (1968) ---- 15, 18
Hearings on the Federal Magistrates Act (S. 3475, S. 945) before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., & 90th Cong., 1st Sess. (1966 & 1967) ---- 17, 20, 25, 26, 29, 32
Hearings on the United States Commissioner System before the Subcommittee on Improvements in the Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 1st & 2d Sess., pts. 1–3 (1965 & 1966) ---- 16
H.R. Rep. No. 1629, 90th Cong., 2d Sess. (1968) ---- 16, 28
Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779 (1975) ---- 21
S. 3475, 89th Cong., 2d Sess. (1966) ---- 17, 20
S. 945, 90th Cong., 1st Sess. (1967) ---- 17
S. Rep. No. 371, 90th Cong., 1st Sess. (1967) ---- 15, 18, 20, 21, 22, 25, 28

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A–3A) is reported at 503 F. 2d 1049. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, p. 5A) was entered on September 13, 1974. On December 5, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including January 11, 1975. The petition was filed on January 10, 1975, and was granted on March 24, 1975.

The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the Federal Magistrates Act of 1968 (28 U.S.C. 636) authorizes United States district courts to refer all social security benefit cases to United States magistrates for review, hearing, and preparation of a recommended decision on the merits.

STATUTES, RULES AND ORDER INVOLVED

Relevant provisions of the Federal Magistrates Act, Rule 53, Federal Rules of Civil Procedure, and General Order No. 104–D of the United States District Court for the Central District of California, are reproduced at Pet. Apps. D and E, pp. 9A–20A.

STATEMENT

Respondent brought this action in the United States District Court for the Central District of California under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to review a final determination by the Secretary of Health, Education, and Welfare that respondent was not entitled to reimbursement under Title XVIII of the Act (Medicare) [1] for medical payments made on behalf of his wife (now deceased). On the same day the complaint was filed, the clerk of the district court assigned the case to Judge Curtis, and referred it to United States Magistrate Kronenberg "to notice and conduct such factual hearings and legal argument as may be appropriate" and to "prepare a proposed written order or decision, together

[1] 42 U.S.C. 1395, *et seq.* Section 205(g) governs judicial review of Medicare claims. See 42 U.S.C. (Supp. III) 1395ff(b).

with proposed findings of fact and conclusions of law where necessary or appropriate, which shall be transmitted in writing to * * * [Judge Curtis]" (R. 3).[2]

The clerk acted pursuant to General Order No. 104–D of the district court (Pet. App. E, pp. 13A–20A), which requires that all federal civil cases in seven categories involving review of determinations of administrative agencies be automatically referred to a magistrate for review, hearing and preparation of a proposed decision.[3] In addition to all social security

[2] "R." designates the record on appeal, consisting of the pleadings in the district court. On June 9, 1975, the Court granted our motion to dispense with the printing of an appendix.

[3] General Order No. 104–D states in pertinent part (Pet. App. E, pp. 13A–14A):

"The Magistrate is authorized to notice, hear and conduct such factual hearing and legal argument as may be appropriate. Thereafter, he shall prepare a proposed written order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate, which shall be served by mail upon all parties. Any party having objections to the proposed order or decision or to any proposed finding of fact or conclusion of law shall, not later than 20 days after such service upon him, file and serve a written statement of objections with points and authorities in support thereof. Any reply to said objections and points and authorities shall be in writing and filed not later than 20 days from the date of service of said objections. No response to the reply will be received. The Magistrate shall promptly examine the documents relating to said objections and he may conduct such further hearing as he deems necessary, make such additional supplemental or substitute proposed findings and conclusions, and such modifications in the proposed judgment, as he deems appropriate and, if such are made, shall serve them by mail upon all parties. * * * When the Magistrate has taken the action which he deems appropriate and a transcript has been filed (when a transcript is required), the Magistrate shall for-

benefit cases,[4] General Order No. 104–D also requires blanket reference to magistrates of actions to review: Interstate Commerce Commission orders concerning freight overcharges; Immigration and Naturalization Service orders concerning deportation, preference visas or adjustments of status; Civil Service Commission or other agency orders concerning personnel action; military service orders denying discharge; Treasury Department orders denying firearms-related licenses; and Labor Department orders denying alien employment certifications.[5]

ward the entire file to the Judge to whom the matter is assigned for final action and notify the parties accordingly. Upon receipt of the file, the Judge will calendar the matter for oral argument before him if he deems it necessary or appropriate."

[4] Section I(A) of General Order No. 104–D. This section requires reference to magistrates of "[a]ctions to review administrative determinations re entitlement to benefits under the Social Security Act and related statutes, including but not limited to actions filed under 42 U.S.C. § 405(g)" (Pet. App. E, p. 15A).

[5] General Order No. 104–D, Section I, provides in pertinent part that in addition to social security cases, all of the following actions involving "review [of] an administrative or judicial record" be referred to a magistrate (Pet. App. E, pp. 15A–16A):

"(B) Actions filed by the United States or a carrier to review, implement or restrain orders of the Interstate Commerce Commission re freight overcharges, including but not limited to actions under 28 U.S.C. § 1336 and 49 U.S.C. § 304a.

"(C) Actions, whether in the form of judicial review, habeas corpus or otherwise, for review of orders and other actions of the Immigration and Naturalization Service. Included, but not by way of limitation, are actions involving deportation orders, denial of preference classification visas and denial of petitions to adjust status.

"(D) Actions for review of adjudications by the Civil Service Commission, or the various departments or agencies, involving personnel actions such as wrongful discharge, reductions in force, transfers, retirements, etc.

"(E) Actions for review of an order of any branch or establishment of the military service denying discharge of petitioner from the military, whether such actions are brought in the form of petitions for judicial review, habeas corpus or actions for declaratory relief and injunction.

"(F) Actions filed pursuant to 18 U.S.C. § 923(f)(3) to review administrative decisions denying applications for licenses to engage in business as a firearms or ammunition importer, manufacturer or dealer.

"(G) Actions to review administrative decisions by the Department of Labor denying applications for alien employment certification required pursuant to the provisions of 8 U.S.C. §1182(a)(14)."

The same provision also requires reference to magistrates of all actions to recover penalties under a variety of statutes.[6] Finally, General Order No. 104–D

[6] General Order No. 104–D (II) requires that all of the following actions to collect and enforce civil penalties be referred to a magistrate (Pet. App. E, p. 16A):

"(A) Actions to recover civil penalties relating to boating including, but not by way of limitation, penalties under the Coordinated National Boating Safety Program (46 U.S.C. §§ 1451–89 inclusive) and penalties under the Motor Boat Act of 1940 (46 U.S.C. §§ 526–526u inclusive).

"(B) Actions to recover FAA penalties imposed under the Federal Aviation Act, including, but not by way of limitation, penalties imposed under 49 U.S.C. §§ 1471ff.

"(C) Actions to recover civil bomb hoax penalties, including, but not by way of limitation, penalties under 18 U.S.C. § 35(a).

"(D) Actions to recover Interstate Commerce Commission penalties including, but not by way of limitation, penalties under 49 U.S.C. § 322(h).

"(E) Actions to recover penalties under the Packers and Stockyards Act, including, but not by way of limitation, penalties under 7 U.S.C. § 203.

"(F) Actions to recover penalties under the Wheat Marketing Allocation Act, including, but not by way of limitation, penalties under 7 U.S.C. § 1379i(a)."

578—241—75——2

provides for essentially equivalent references to magistrates of all Civil Rights Act cases filed by plaintiffs not in confinement but appearing *pro se* (except those involving employment discrimination arising under Title VII) and all such cases filed by plaintiffs in confinement who have retained counsel (Pet. App. E, pp. 17A–18A).[7]

The Secretary moved to vacate the order of reference on the ground that referral of the case to a magistrate pursuant to the district court's general order violated Rule 53(b) of the Federal Rules of Civil Procedure, was not authorized under the Federal Magistrates Act of 1968, was of doubtful constitutionality, and contravened the judicial review provisions of the Social Security Act by interjecting an additional level of review in the district court (R. 6).

The district court denied the Secretary's motion.[8] On interlocutory appeal under 28 U.S.C. 1292(b) (Pet. App. C, pp. 7A–8A), the court of appeals affirmed (Pet. App. A, pp. 1A–3A). The court summarized the basic operation of General Order No. 104–D as follows (Pet. App. A, p. 3A):

> [T]he procedure followed under the rule objected to is for the magistrate to examine the written administrative record and make a recommendation to the judge. The parties are advised of the magistrate's initial opinion and are afforded time to present objections. If objection be made, an opportunity is given to present briefs and argument in support thereof. The magistrate may then revise his original recommendation or adhere to it. Under either contingency he then forwards his recommendation and the administrative record together with a report of proceedings before him, if any, to the judge for final action.[9]

[7] The same provisions also apply to all habeas corpus cases filed by present or former state prisoners having retained counsel (*id.* at 17A).

[8] Respondent took no position on the reference of his case to a magistrate and did not participate in the appeal. The Secretary's position was opposed, however, by the National Council of United States Magistrates, which filed a brief and presented oral arguments in the court of appeals as *amicus curiae*.

The court of appeals concluded (*ibid.*):

> As so applied, we hold that the delegated authority is well within the intent of Congress in adopting the Magistrate Act; that the judicial review contemplated by the Social Security Act is adequately provided and that the procedure comports with the requirement of exercise of judicial power under Article III of the United States Constitution.

SUMMARY OF ARGUMENT

In addition to authorizing United States Magistrates to perform certain specified statutory functions, the Federal Magistrates Act authorizes district courts to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States," which may include, but are not re-

[9] General Order No. 104–D also authorizes the magistrate to make "findings of fact" (Pet. App. E, p. 13A). The court considered this to be "at worst surplusage" in the context of social security cases, in view of the statutory requirement (42 U.S.C. 405(g)) that the Secretary's findings of fact be reviewed on the administrative record under the "substantial evidence" standard (Pet. App. A, p. 3A, n. 1).

stricted to, three specified functions. Pursuant to this authority, the United States District Court for the Central District of California adopted General Order No. 104–D, which requires that every one of seven categories of cases, including all social security benefit cases, be assigned to a magistrate to prepare a recommended decision. The issue in the case is whether the Magistrates Act authorizes this procedure. Although the issue arises in a social security case, the principle involved has much broader ramifications, since if the Magistrates Act permits such reference of those cases, there is no reason why it would not also be permissible in a large variety of other cases.

In the Magistrates Act, Congress gave magistrates only a limited role in the operation of the federal judicial system. District courts were not authorized to delegate to the magistrates all judicial functions that they deemed appropriate. Rather, the role of the magistrates was to assist, and lighten the workload of, district judges by performing relatively minor functions. The statutory phrase authorizing the district courts to assign to magistrates "duties * * * not inconsistent with the Constitution and laws of the United States" must be read narrowly to reflect the limitations imposed upon the magistrates.

A. The legislative history of the Magistrates Act shows that Congress intended those officers to have only limited authority. The restrictions imposed upon the use of magistrates in connection with pre-trial

and discovery proceedings and the limited circumstances in which those officers are authorized to make recommendations to the district courts, both manifest the legislative intention carefully to limit the magistrates' authority.

B. In preparing a recommended decision in a social security case, a magistrate would perform the same functions that a special master normally does. Although Section 636(b)(1) authorizes the use of a magistrate "as a special master in an appropriate civil action," he may so act only "pursuant to * * * the Federal Rules of Civil Procedure." The blanket references of all social security cases to magistrates that General Order No. 104–D requires would violate Rule 53, because that rule permits references to special masters only in exceptional cases and not routinely. *La Buy* v. *Howes Leather Co.*, 352 U.S. 249. Such blanket reference cannot be accomplished indirectly under the general authority to assign to magistrates duties not inconsistent with the Constitution and laws of the United States. There would have been no reason for the limitations Congress provided upon the use of magistrates as special masters if those limitations could be avoided by changing the form in which cases were referred to magistrates to prepare a recommended decision.

C. The number of social security cases in the district courts is substantial and is increasing, and the thirteen or more districts that now routinely employ magistrates to prepare recommended decisions in those cases obviously believe that the procedure is a desir-

able one to lighten the burdens of the district courts. It is impossible to determine, however, whether and to what extent that use of magistrates will do so significantly or will accelerate their decisions.

While there apparently is much to be said as a policy matter for this use of magistrates, such a far-reaching change in the manner in which the district courts conduct proceedings to review decisions of administrative agencies should be made by Congress and not by the courts. Congress has not specifically focused upon this problem, and the language, statutory scheme and history of the Magistrates Act indicate that Congress intended those officers to have only a limited role. The effect upon judicial administration of blanket reference to magistrates to prepare recommended decisions in social security and other cases thus is not a permissible basis for the expansive reading of the Magistrates Act that would be necessary in order to sanction the practice.

ARGUMENT

THE FEDERAL MAGISTRATES ACT DOES NOT AUTHORIZE THE AUTOMATIC REFERENCE TO UNITED STATES MAGISTRATES OF ALL SOCIAL SECURITY CASES TO PREPARE A RECOMMENDED DECISION

In addition to authorizing United States magistrates to perform certain specified statutory functions,[10] the

[10] United States Magistrates have "all powers and duties conferred or imposed upon United States commissioners." They may conduct trials of minor offenses under 18 U.S.C. 3401, if the parties consent; impose conditions of pretrial release in non-capital cases under 18 U.S.C. 3146; and administer oaths and affirmations and take acknowledgements, affidavits and depositions. 28 U.S.C. 636(a).

Federal Magistrates Act authorizes the United States district courts to adopt rules assigning to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States," which may include, but are not restricted to—

> (1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;
>
> (2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
>
> (3) preliminary review of applications for posttrial relief made by individuals convicted of criminal offenses, and submission of a report and recomendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing. [28 U.S.C. 636(b).]

Pursuant to this authority, the United States District Court for the Central District of California adopted General Order No. 104–D. It requires that every one of seven categories of cases be automatically assigned to a United States Magistrate to conduct appropriate proceedings and then to prepare a proposed order or decision, together with proposed findings of fact and conclusions of law where necessary or appropriate.

The issue in this case is whether the Federal Magistrates Act authorizes this procedure. Although the issue arises in the context of a social security case, the principle involved has much broader ramifica-

tions.[11] If the Federal Magistrates Act permits such reference of social security cases, there is no reason why reference is not also permissible in a large variety of other cases, including the six additional categories that General Order No. 104–D now covers. Moreover, in addition to those categories, many other actions of administrative agencies are reviewable in district courts pursuant either to specific statutes [12] or, assuming a basis for federal court jurisdiction, to the gen-

[11] We no longer rely upon the argument (Pet. 12) that General Order 104–D exceeds the authority granted by Section 636(b) because it is "inconsistent" with the Social Security Act. In providing for review of the Secretary's decision by "the court" on a specified record, that Act cannot be said, any more or less than most other statutes authorizing judicial review of agency action, to have required that district judges act without such assistance from magistrates as would otherwise be permissible under the Magistrates Act. Compare *Wingo* v. *Wedding*, 418 U.S. 461, 468–469, 481–482.

[12] See, *e.g.*, 5 U.S.C. 553(b)(3) (Freedom of Information Act); 12 U.S.C. (Supp. III) 1904 note and 15 U.S.C. (Supp. III) 754(a)(1) (actions of Federal Energy Administration); 28 U.S.C. 1336(a) (orders of Interstate Commerce Commission); 33 U.S.C. 921(b) (Secretary of Labor's order under Longshoremen's and Harbor Workers' Compensation Act); 42 U.S.C. 1857h–2(a)(2) (certain acts or omissions of Environmental Protection Agency Administrator under the Clean Air Act).

A district judge in the District of Columbia recently announced that he would refer "almost any complex [Freedom of Information Act] case" to a special master to prepare a recommended decision. *Schlesinger* v. *United States District Court*, No. 74–1142, certiorari denied, April 28, 1975, petition, p. 6.

eral provisions of the Administrative Procedure Act. 5 U.S.C. 703.[13] See also 28 U.S.C. 2347(b)(3).

Indeed, under this view of the Magistrates Act, it is difficult to see why a district with a heavy docket and only a small number of judges could not properly decide that because antitrust or patent cases are complex and likely to occupy all or most of a judge's time for a protracted period, those cases should be referred to a magistrate for hearing and the preparation of a recommended decision. In *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, however, this Court held that reference of an antitrust case to a special master for trial was impermissible. There is nothing in the language or history of the Magistrates Act that even suggests that Congress intended to sanction the kind of reference that this Court condemned in *La Buy*.

In determining the scope of the authority Congress intended the magistrates to exercise, it is essential to recognize the limited role that such officers were intended to have in the operation of the federal judicial system. They were not to be a lower tier of quasi-judges to whom the district courts were authorized to delegate any judicial functions that they deemed appropriate. Rather, their role was to assist and lighten

[13] *E.g.*, *Camp* v. *Pitts*, 411 U.S. 138, 140 (grant or denial of national bank charter and other rulings by Comptroller of Currency); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (approval of highway by Secretary of Transportation).

578—241—75——3

the workload of district judges by performing relatively minor functions.

It is in the light of this background that the meaning of the statutory phrase "duties * * * not inconsistent with the Constitution and laws of the United States" must be determined. Although these words are broad, their content depends upon the scope of the authority Congress intended the magistrates to have. If, as we submit, that authority was intended to be narrow, then the words cannot be given their potentially broad reach, but instead must be read to reflect the limitations Congress imposed upon the magistrates.

The three illustrative categories of duties that Congress specifically authorized the district courts to empower magistrates to perform are significant in showing the limited authority Congress intended those officers to have. The second and third of them on their face do not authorize the reference of social security cases for preparation of a recommended decision. These categories are (2) providing "assistance to a district judge in the conduct of pretrial or discovery proceedings" and (3) "preliminary review of applications for posttrial relief" in criminal cases and recommending to the district judge whether there should be a hearing on the application. These functions are a far cry from the judicial function that General Order No. 104–D authorizes magistrates to perform.

The first category—(1) "service as a special master in an appropriate civil action"—similarly contemplates only a limited role for the magistrates, for

the Act specifies that such service is to be "pursuant to * * * the Federal Rules of Civil Procedure." Rule 53 of those rules permits a reference to a master only in the exceptional case and not routinely. See pp. 24–27, *infra*. Since, as we show below (pp. 27–29, *infra*), the reference of a social security case to a magistrate to prepare a recommended decision is essentially equivalent to a reference to serve as a special master, the blanket reference of all social security cases to magistrates cannot be justified by, and indeed is inconsistent with, the authority in the Federal Magistrates Act for magistrates to serve as special masters.

A. THE FUNCTIONS THAT THE DISTRICT COURTS MAY AUTHORIZE MAGISTRATES TO PERFORM UNDER THE MAGISTRATES ACT ARE NARROWLY LIMITED TO MATTERS ANCILLARY TO LITIGATION NOT THEMSELVES INVOLVING ADJUDICATION OF CASES

The purpose of Section 636(b) was to authorize district courts to secure the assistance of magistrates in handling various ancillary aspects of litigation,[11] leaving the judges with more time "for the careful and unhurried performance of their vital and traditional adjudicatory duties." S. Rep. No. 371, 90th Cong., 1st Sess. 26 (1967). But Congress "empha-

[11] Senator Tydings, principal sponsor of the Act, described it to the House Judiciary Committee as a means of "easing some of the routine nonjudicial burdens" of the district courts. Hearings on the Federal Magistrates Act before Subcommittee No. 4 of the House Committee on the Judiciary, 90th Cong., 2d Sess. 73 (1968).

size[d] that this provision * * * cannot be read in derogation of the fundamental responsibility of judges to decide the cases before them * * *." *Ibid.* Section 636 thus implemented the overall purpose of the Act "to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers." *Id.* at 9; H.R. Rep. No. 1629, 90th Cong., 2d Sess. 12 (1968).

The Magistrates Act derived from the study by a Senate committee in the 89th Congress of the role of United States Commissioners, whose civil jurisdiction "was limited to administering oaths and taking acknowledgements, affidavits and depositions * * *." *TPO, Inc.* v. *McMillen,* 460 F. 2d 348, 355 (C.A. 7). See generally Hearings on the United States Commissioner System before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 1st & 2d Sess., pts. 1–3 (1965 & 1966). Although there had been no significant discussion at those hearings of giving commissioners additional duties in civil cases,[15] Senator Tydings, chairman of the subcommittee that held the hearings, introduced in the 90th Congress a bill that, anticipating the general outlines of the Magistrates Act, would have authorized district courts to prescribe additional duties for magistrates such as "supervision of the conduct of any pretrial discovery proceeding in a

[15] One witness had suggested that commissioners might be used "to handle settlement conferences." Senate Hearings on the United States Commissioner System, *supra*, pt. 1, at 10.

civil or criminal action * * *." Sec. 636(b)(2), S. 3475, 89th Cong., 2d Sess. (1966)."[16]

Section 636(b) of that bill, however, was criticized as going further than was prudent or constitutionally permissible in attempting to upgrade the role of the commissioner. For example, the Judicial Conference of the United States stated that the enumeration of duties in Section 636(b) was so "broad" and "general" as to be "vulnerable to possible constitutional attack." Hearings on the Federal Magistrates Act (S. 3475, S. 945) before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. & 90th Cong., 1st Sess. 241n (1966 & 1967).

In response to such criticism, and in an effort to ensure that the duties to be performed by magistrates were kept within constitutional limits, Senator Tydings submitted a revised bill (S. 945, 90th Cong., 1st Sess. (1967)), in which the "additional duties" assignable to magistrates were "drastic[ally]" cut back. *TPO, Inc.* v. *McMillen, supra,* 460 F. 2d at 357. Under revised Section 636(b)(2), as under the Act, magistrates were merely authorized to provide "assistance to a district judge in the conduct of pretrial or discovery proceedings * * *." The Senate committee report explained that this change was to indicate more

[16] A staff memorandum accompanying a draft bill identical to S. 3475 in this respect had referred to "the holding of pretrial hearings" as among the duties courts could give to magistrates. Senate Hearings on the Federal Magistrates Act, *supra*, at 14. The staff memorandum accompanying S. 3475 omitted that language in describing the new functions that Section 636(b) would authorize courts to give magistrates.

explicitly "that the district judge is to retain ultimate responsibility for the conduct of pretrial or discovery proceedings." [17] S. Rep. No. 371, *supra,* at 25–26.[18]

The limited scope of the "assistance to a district judge in the conduct of pretrial or discovery" proceedings that Congress intended magistrates to provide is underlined by the reference in the Senate committee report to the office of the pretrial examiner in the United States District Court for the District of Columbia. *Id.* at 26. That official was then authorized only to make recommendations to the district court on various specified procedural motions and discovery matters, which did not include motions to dismiss or

[17] In testifying on S. 945 before the House Judiciary Committee, Senator Tydings similarly emphasized that "a district judge would retain ultimate responsibility for decision making in every instance in which a magistrate might exercise additional duties jurisdiction * * *." House Hearings on the Federal Magistrates Act, *supra*, at 73.

[18] The Senate report further stated that Section 636(b) "contemplates assignments to magistrates under circumstances where the ultimate decision of the case is reserved to the judge * * *" (S. Rep. No. 371, *supra*, at 26). But, that does not mean that the district courts were being given a free hand to assign to magistrates duties other than those typified in Section 636(b)(1)–(3) so long as the judge was at least nominally responsible for the ultimate decision. Rather, the statement indicated that in all cases covered by Section 636(b) the ultimate decision must be reserved to the judge unless "action can properly be taken by a nonarticle III judge." *Id.* at 26–27. In other words, that statement in the report addressed the allocation of responsibility concerning particular assignments to magistrates, not the delineation of areas in which magistrates could be assigned to assist judges.

for summary judgment.[19] The parties could file objections to the examiner's recommendation and were entitled to a hearing thereon before the district judge. See Rule 9(a)(4), (i), D. D.C. Civ. R. (as amended December 3, 1965).[20]

The narrow range of duties that Section 636(b)(2) permits the district courts to assign to magistrates is further shown by the fact that, where Congress intended magistrates to conduct a "preliminary review" on the merits and to submit "recommendations to facilitate the decision of the district judge having jurisdication over the case," it explicitly so provided. Section 636(b)(3) authorizes the district courts to empower magistrates to "preliminar[ily] review" applications for post-conviction relief and recommend

[19] Social security cases and others involving judicial review based on an administrative record are typically disposed of by motions to dismiss or for summary judgment.

[20] The examiner could entertain and make recommendation on the following motions: to place cases upon the Ready Calendar and objections thereto, and to remove a case from the Ready Calendar; to consolidate; to sever; for security for costs; to add additional parties; for leave to file third-party complaints; for leave to amend pleadings and to file amended complaints; for suspension, alteration or rescission by the court of orders granted by the clerk under Sections (1) and (2) of local Rule 10; to set aside default judgments; to vacate dismissals for want of prosecution; objecting to, seeking to enlarge or strike, and otherwise relating to interrogatories; to continue dates, or to change places for taking of depositions; for discovery and production of documents under Rule 34, Fed. R. Civ. P.; for physical examinations under Rule 35; and for substitution of counsel.

to the district judge whether there should be a hearing.[21] Even here, however, the magistrates' authority is extremely limited: he cannot recommend whether the application should be granted, but only whether there should be a hearing on it.[22] See *Wingo* v. *Wedding*, 418 U.S. 461, 470–473.

The Senate Committee report pointed out (S. Rep. No. 371, *supra*, at 26) that if the "district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, your committee believes that there will be increased time available to judges for the careful and unhurried performance of their vital and traditional

[21] If Section 636(b)(2) were broad enough to authorize General Order No. 104–D, then Section 636(b)(3) would seem superfluous. The counterpart of Section 636(b)(3) in the original bill (S. 3475) did grant distinct authority to magistrates since their authority under Section 636(b)(2) of that bill applied only to "pretrial discovery proceedings" (see pp. 16–17, *supra*). It is not likely that the addition of "or" between "pretrial" and "discovery" could have been intended by Congress, without discussion, to enlarge substantially the scope of Section 636(b)(2) so as to include all types of "pretrial" motions or proceedings. But see Doyle, *Implementing the Federal Magistrates Act*, 39 J. B. A. Kan. 25, 67 (1970).

[22] One witness suggested that the original bill (S. 3475) be amended to authorize magistrates, with the consent of the parties, to try certain kinds of civil cases, adding that "[t]o avoid any jurisdictional problem, the procedure might be cast in the form of a recommendation by the magistrate to the district court, which would confirm that recommendation as its own judgment." Senate Hearings on the Federal Magistrates Act, *supra*, at 235. There is no suggestion in the legislative history, however, that Congress intended to adopt this suggestion, which, while like General Order No. 104–D in providing for a recommended disposition on the merits by a magistrate, was significantly narrower in that it required the parties' consent.

adjudicatory duties * * *." One of those "vital and traditional adjudicatory duties" is the review of administrative decisions to determine whether they have "'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131. General Order No. 104–D, however, delegates that judicial function primarily to the magistrates. See *infra*, pp. 28–29.

The limitations upon the authority that Congress gave to magistrates, particularly with respect to rendering recommended or actual decisions,[23] reflected in part the legislative concern that granting those officials broader powers might raise constitutional problems involving the exercise of "the judicial power of the United States" by persons other than Article III judges.[24] See, *e.g.*, S. Rep. No. 371, *supra*, at 8, 25, 30–32, 36. See generally Note, *Masters and Magistrates in the Federal Courts*, 88 Harv. L. Rev. 779, 780–789 (1975). Those limitations also reflect the somewhat experimental nature of this reform of judicial administration. Cf. S. Rep. No. 371, *supra*, at 26.[25]

[23] The Act gave magistrates limited jurisdiction to try certain "minor" offenses, but only with the parties' consent, followed by the right of appeal to the district court. 18 U.S.C. 3401; 28 U.S.C. 636(a)(3).

[24] Full-time magistrates are appointed for eight years, part-time magistrates for four years, and both can be removed on grounds in addition to misconduct. 28 U.S.C. 631(e), (h). Compare 28 U.S.C. 133.

[25] Moreover, the additional duties assignable under Section 636(b) were "intended to supplement, rather than supplant," the other statutory duties the Act imposed on magistrates, and it was "not anticipated that magistrates will be assigned additional duties under section 636(b) to such a degree that inter-

Whatever may be the validity of those congressional concerns,[26] the fact remains that in the Federal Magistrates Act Congress acted cautiously and permitted the district courts to authorize the newly-created officers to exercise only limited authority. As we now show, that authority does not include the preparation of recommended decisions in entire categories of cases that the district court has referred to them for that purpose on a routine basis and without regard to the complexity or particular problems of the individual case.[27]

ference with their specific statutory functions will result * * *." S. Rep. No. 371, *supra*, at 27.

[26] We do not contend that the Magistrates Act would violate Article III of the Constitution if it authorized courts to adopt rules like General Order No. 104–D. Cf. *Palmore* v. *United States*, 411 U.S. 389, 400–404, 407–410. We suggest only that Congress did not purport to exercise to the fullest extent its power over the federal courts. Compare, *e.g.*, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 124–125.

[27] In the court of appeals the National Council of United States Magistrates argued as *amicus curiae* that the preparation by magistrates of recommended decisions may be analogized to the function that law clerks perform for some district judges (Br. 26). The relationship between a district judge and his law clerk, however, is significantly different from that between a magistrate and a district judge. A law clerk typically is selected and appointed by the judge (28 U.S.C. 752) and serves him normally for only one year under the judge's direct and close supervision. The relationship between the judge and law clerk is a unique one of confidence and confidentiality.

A full-time magistrate, on the other hand, is appointed for eight years by the majority of the judges of the district court (28 U.S.C. 631(a)), has no particular relationship with or allegiance to a specific judge, does not enjoy any confidential relation-

B. THE CHALLENGED DISTRICT COURT ORDER REQUIRES MAGISTRATES TO SERVE AS SPECIAL MASTERS, IN VIOLATION OF THE FEDERAL RULES OF CIVIL PROCEDURE (WHICH THE MAGISTRATES ACT MAKES APPLICABLE TO SUCH SERVICE), BECAUSE RULE 53 PERMITS SUCH REFERENCE ONLY IN EXCEPTIONAL CASES AND NOT ROUTINELY

The only provision in Section 636(b) that in terms might appear to authorize the district courts to refer all social security cases to magistrates to prepare recommended decisions is the authorization of magistrates to serve "as a special master in an appropriate civil action, pursuant to * * * the Federal Rules of Civil Procedure for the United States district courts." 28 U.S.C. 636(b)(1). In preparing such recommended decisions, the magistrates would perform the same functions as special masters. The reference of those cases to magistrates as special masters would violate Rule 53 of the Federal Rules of Civil Procedure, because that rule permits references to special masters only in exceptional cases and not routinely. Moreover, Congress did not intend to permit the district courts, by acting under the general language of the statute permitting them to assign to magistrates "additional duties * * * not inconsistent with the Constitution and laws of the United States," to avoid the limitations of Rule 53 and make the very type of references

ship with him and, indeed, functions as an independent officer. There is no reason to believe that, in creating the office of magistrate, Congress intended those officers to perform the same functions and have the same authority as a judge's law clerk.

to magistrates that the rule would not permit to special masters.

1. The magistrate's role in a social security case "referred" pursuant to General Order No. 104–D is essentially that of a special master appointed in such a case pursuant to Rule 53. Like a special master, a magistrate receives briefs and hears argument, submits an initial report to the parties and, after considering their comments, submits a recommended decision on the legal issues raised by the complaint. The district court may accept or reject that recommendation, and need not accord it any special deference. General Order No. 104–D (Pet. App. E, pp. 13A–14A); Fed. R. Civ. P. 53(c), (e)(1), (2), (5).[28]

2. Rule 53(b) provides that:

> * * * reference to a master shall be the exception and not the rule. * * * [I]n actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

In authorizing magistrates to serve as special masters, the Magistrates Act intended to continue those limitations. See *United States* v. *Eastmount Shipping Corp.*, 62 F.R.D. 437, 440–441 (S.D. N.Y.).

[28] A special master is authorized to hear evidence and make findings of fact, which the court in a non-jury trial "shall accept * * * unless clearly erroneous." Fed. R. Civ. P. 53(c), (e)(1), (2). Although General Order No. 104–D also provides for fact findings by magistrates, it does not explicitly require the court to accept them. However, because of the limited scope of judicial review in social security cases, the fact-finding functions of magistrates are not directly in issue in this case, as the court of appeals acknowledged (see p. 7, *supra*, n. 9).

Unlike the earlier bills (which did not include the limitation), Section 636(b)(1) provides that a magistrate may serve as a special master only in accordance with the Federal Rules of Civil Procedure. In explaining this requirement, added in response to criticism by the Judicial Conference (see p. 17, *supra*),[29] the Senate Report stated (S. Rep. No. 371, *supra*, at 25):

> [i]n particular, rule 53(b) provides that a reference to a master shall be the exception and not the rule; that in actions tried by a jury a reference shall be made only when the issues are complicated; and that in actions tried without a jury, save in matters of account, a reference shall be made only upon a showing that exceptional circumstances require it. These conditions, which in essence reflect the rule laid down by the Supreme Court in *LaBuy v. Howes Leather Company*, 352 U.S. 249 (1957), protect against any abdication of the decision-making responsibility that is properly that of the district courts. A memorandum * * * prepared by the staff of the Subcommittee on Improvements in Judicial Machinery * * * pro-

[29] The Judicial Conference approved the revised version of Section 636(b)(1) "subject to the qualifications expressed in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, and also subject to the observation that its approval is not to be construed to modify or extend the present rules on the use of special masters. * * * [T]hese qualifications could be satisfactorily met by incorporation of a reference to the *La Buy* rule in the report of the Congressional committee" (Senate Hearings on the Federal Magistrates Act, *supra*, at 244).

vides an analysis of rules relevant to the assignment of magistrates as masters.[30]

Thus, service of magistrates as special masters is subject to the overriding principle, reiterated in *La Buy,* that civil cases should "seldom" be referred to a master, "'and if at all only when unusual circumstances exist,'" because "'[l]itigants are entitled to a trial by the court, in every suit * * *.'" 352 U.S. at 258.

Moreover, these limitations on references to masters are to be strictly applied. For example, docket "congestion in itself is not such an exceptional circumstance as to warrant reference to a master" (*id.* at 259). The practice of referring a particular category of civil cases to a master, without regard to the circumstance of the individual case, is improper because "what time there is of the court, in view of the whole docket, must be equitably distributed." *Los Angeles Brush Mfg. Corp.* v. *James,* 272 U.S. 701, 708.[31]

[30] The staff memorandum noted three "fundamental reasons for restricting the use of special masters": (1) the resulting "abdication of the judicial power which is reserved in the judiciary by the Constitution;" (2) infringement upon "a litigant's right to have his case tried before a judge and/or a jury;" and (3) "increased cost which references invariably cause." Senate Hearings on the Federal Magistrates Act, *supra,* at 281–282. The staff study added that "the practice of systematically referring particular types of cases to a master violates * * * [the] fundamental principle [that reference to a master should be the exception and] * * * has been uniformly prohibited." *Id.* at 282.

[31] In *Los Angeles Brush* the Court observed that if it found that the rules of procedure limiting references to masters "have been practically nullified by a district judge, or by a concert of action on the part of several district judges, it would not hesitate to restrain them." 272 U.S. at 707.

As the Sixth Circuit stated in *Ingram* v. *Richardson,* 471 F. 2d 1268, 1271–1272, in ruling that "[i]t was error" for the district court to refer a social security case to a magistrate to prepare a recommended decision, there is "no good reason why * * * [social security] cases should be shunted in favor of other civil actions." See also *McCullough* v. *Cosgrave,* 309 U.S. 634;[32] *La Buy* v. *Howes Leather Co., supra,* 352 U.S. at 266 (Brennan, J., dissenting).

3. The blanket reference of all social security cases to magistrates serving as special masters to prepare recommended decisions would not be permissible under Section 636(b)(1), because such service would not be in conformity with Rule 53. The remaining question is whether the Magistrates Act nevertheless permits the district courts to do indirectly what they could not do directly by similarly referring these cases to magistrates without designating those officers as special masters.

In light of the care Congress took to insure that references to magistrates as special masters be limited to exceptional cases, the legislature certainly did not

[32] It is of historical interest that the Central District of California, whose extensive delegation of powers to magistrates is before the Court in this case, constituted until 1966 the major geographical area of the Southern District of California (see 28 U.S.C. 84(c), (d); 80 Stat. 75–76), the district whose practices in referring cases to masters were before the Court in *Los Angeles Brush* and *McCullough.* At the time of the references in those cases, the Southern District had two and seven judges, respectively; now the Central and Southern Districts have sixteen and five judges, respectively, for a total of 21 in what was previously the Southern District. See 28 U.S.C. (1940 ed.) 1 note; 28 U.S.C. 133.

intend to sanction the automatic reference of entire categories of cases to magistrates to perform the same functions they could perform as special masters only in extremely limited circumstances based upon the exceptional nature of the individual case. There would have been no reason for the limitations Congress provided upon the use of magistrates as special masters if those limitations could be avoided by changing the form in which cases were referred to magistrates to prepare a recommended decision. The additional duties that Congress specifically authorized the district courts to assign to magistrates were "intended to illustrate the general character of duties assignable to magistrates under the act * * *." S. Rep. No. 371, *supra,* at 25; H.R. Rep. No. 1629, *supra,* at 19. The district courts' authority to assign to magistrates additional duties "not inconsistent with the Constitution and laws of the United States" (28 U.S.C. 636(b)) must be interpreted in the light of the underlying congressional purpose to give magistrates only limited authority to perform relatively minor functions that are ancillary to the judicial function of adjudicating cases.

The fact that the magistrate renders only a recommended decision, which the district court may accept or reject, does not justify the blanket reference of all social security cases to magistrates. In practice, the district courts rarely reject the magistrate's recommended decision. For example, our review of all social security cases referred to magistrates in the fiscal year 1974 in the Central District of California and in the

Northern District of Georgia, which has a similar rule, revealed that in none did the court reject the magistrate's recommended decision (Pet. 7, n. 10).

The infrequency of reversal of magistrates' recommended decisions is hardly surprising, since most social security cases involve the question whether the Secretary's findings are supported by substantial evidence. Once the magistrates have reviewed the administrative record, which may be lengthy, and rendered a recommended decision on that issue, busy district court judges are understandably reluctant to recanvass in detail the same ground. As the Court of Appeals for the Seventh Circuit has recognized with respect to the analogous relationship between the district judge and a master, "[w]hen a master is appointed, 'you do not get the judge, you get the judicial determination of the master.'" *TPO, Inc.* v. *McMillen, supra,* 460 F. 2d at 356, n 50.[23]

C. THE EFFECTS UPON JUDICIAL ADMINISTRATION OF REFERENCE OF ALL SOCIAL SECURITY CASES TO MAGISTRATES DO NOT JUSTIFY GENERAL ORDER NO. 104–D, BUT ARE MATTERS FOR CONGRESS TO CONSIDER

The number of social security cases in the district courts is substantial and is increasing. The Depart-

[23] One experienced district judge has said that he "cannot think of any ministerial area where a master could take over, where it does not result in adjudication." Senate Hearings on the Federal Magistrates Act, *supra,* at 69. See also *Rainha* v. *Cassidy,* 454 F. 2d 207, 208 (C.A. 1), expressing concern about a district judge's approval of a magistrate's decision by "a pro forma laying on of the hands * * *."

ment of Health, Education, and Welfare ("HEW") has advised that more than 2,500 of these cases were filed in 1973 and more than 4,000 in 1974, and that based on the level of current filings and administrative hearings, approximately 7,000 cases will be filed this year and about 11,000 in 1976. HEW estimates that the question of disability is an issue in at least ninety percent of those cases.[34] HEW also advises that thirteen district courts generally refer social security cases to magistrates,[35] and one is considering a recommendation to do so.[36] In addition, other district courts refer such cases to magistrates on a more selective basis, so that in fiscal 1974 magistrates prepared recommended decisions in at least some social security cases in 26 of the 91 district courts covered by the Magistrates Act.[37]

[34] The figures for disability cases cover three categories: (1) social security disability cases, (2) cases under the Supplemental Security Income Program (42 U.S.C. (Supp. III) 1381, *et seq.*), pursuant to which since January 1974 the federal government has made direct payments to blind, disabled and aged persons who are needy, and (3) cases under the "black lung" disability program for miners. 30 U.S.C. (Supp. III) 901, *et seq.*

[35] Those districts are: Connecticut; New Jersey; the Western, Middle and Eastern Districts of Pennsylvania; the Northern District of West Virginia; the Northern District of Georgia; Minnesota (where two out of four judges make references); the Eastern District of Oklahoma (where two out of three judges make references); the Eastern District of Missouri; the Central District of California; the Western District of Washington; and Oregon.

[36] The Western District of Wisconsin.

[37] Annual Report of the Director, Administrative Office of the United States Courts, pp. A–102, A–103, table M4 (1974). The Act does not apply to the district courts in the Canal Zone, Guam, and the Virgin Islands.

It is impossible to determine whether and to what extent the use of magistrates to prepare recommended decisions in all social security cases would significantly lighten the burdens of district courts in handling these cases and accelerate their decision. The district courts that utilize this procedure obviously believe that it is advantageous or at least that it appears sufficiently meritorious to warrant trying it.[38] Only about fourteen percent of the total number of district courts (thirteen out of 91), however, routinely use the procedure in social security cases; whether a substantially larger number would do so if the Court upheld it cannot be predicted.

Any procedure that will expedite the handling of a substantial number of cases in the federal court is highly desirable. As a matter of policy, therefore, there apparently is much to be said for the use of magistrates that General Order No. 104–D sanctions.[39]

[38] On the other hand, because the procedure involves two tiers of review—first the magistrate, and then the district court—it may entail additional expenses and delays for the litigants. Although HEW advises that at present social security cases referred to magistrates generally require somewhat less time for final decision at the district court level than cases not so referred, it cannot be foretold whether this pattern would continue if there were a much wider use of magistrates to perform this and other functions.

[39] General Order No. 104–D apparently has the support of the Judicial Conference Committee to Implement the Federal Magistrates Act. In 1970 that Committee, on the basis of then very limited experience with the use of magistrates, included review of social security cases and of other administrative actions in a "checklist" of functions that courts might consider

Our difficulty with that use, however, as set forth in the preceding portions of this brief, is that the language, statutory scheme, and legislative history of the Magistrates Act indicate that Congress intended a much more limited role for magistrates than General Order No. 104–D mandates. The use of magistrates to prepare recommended decisions in substantial categories of cases involving district court review of the decisions of administrative agencies would constitute a far-reaching change in the manner in which the district courts hitherto have conducted this important segment of litigation. Perhaps the time is ripe for such a change. Before it is made, however, we believe that Congress should focus specifically upon the issue and define more precisely than it has done in the Magistrates Act the functions that magistrates may perform in handling these cases.

Congress did not consider this particular problem in enacting the Magistrates Act. Moreover, it may

authorizing magistrates to perform and which the Administrative Office of the United States Courts circulated to all district courts. Hearings on United States Magistrates before Subcommittee No. 4. of the House Committee on the Judiciary. 92d Cong., 1st Sess. 26–31 (1971). The Committee cited no provision of the Act and provided no analysis supporting its view of the expansive scope of authority that may properly be assigned to magistrates—a view that contrasts with the more limited position the Judicial Conference itself expressed during congressional consideration of the Magistrates Act (see pp. 17, 25, *supra*). Indeed, the Judicial Conference opposed a listing of specific "additional duties" in Section 636(b), preferring instead that courts assign duties to magistrates "on a case-by-case basis under such limitations as the court may deem necessary or appropriate." Senate Hearings on the Federal Magistrates Act, *supra*, at 241n.

be that not all cases involving review of administrative decisions should be treated alike. Perhaps magistrates may be appropriately used to prepare recommended decisions in social security cases (or some types thereof) but not in other categories of cases, such as civil rights cases. These are issues that Congress should explore in depth before deciding to expand significantly the authority of magistrates beyond that which they have under the present statute.

In short, the advantages for the district courts of permitting magistrates to prepare recommended decisions in broad categories of cases is a matter for Congress to resolve after a thorough consideration of all facets of the problem. It is, however, not a basis for an expansive reading of what we believe to be the limited authority Congress conferred upon the magistrates in the Magistrates Act.[40]

[40] Because the question presented is one of statutory construction primarily concerning judicial administration, having no probable effect upon the reliability of the proceedings, it would be appropriate that a decision reversing the court of appeals' judgment be prospective, at least in the sense that it would not invalidate judgments or proceedings involving past references of cases to magistrates in which a timely objection to the reference was not made and preserved. Cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105–107.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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